THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 67/2014

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPELLANT**
THE HEAD: SPECIALISED COMMERCIAL CRIME UNIT	**SECOND APPELLANT**
THE NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICE	**THIRD RESPONDENT**
RICHARD NAGGIE MDLULI	**FOURTH APPELLANT**
v	
FREEDOM UNDER LAW	**RESPONDENT**

Neutral citation:	*National Director of Public Prosecutions v Freedom Under Law* (67/14) [2014] ZASCA 58 (17 April 2014).
Coram:	Mthiyane DP, Navsa, Brand, Ponnan *et* Maya JJA
Heard:	**1 April 2014**
Delivered:	**17 April 2014**

Summary: Review application – decisions to withdraw criminal charges by National Prosecuting Authority – reviewable on principle of legality not under the Promotion of Administrative Justice Act 3 of 2000 – decisions by Commissioner of Police to terminate disciplinary proceedings and lift suspension of member – reviewed and set aside under s 6 of PAJA – not competent for the high court to issue mandatory interdicts to compel prosecution and disciplinary charges.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

JUDGMENT

Brand JA (Mthiyane DP, Navsa, Ponnan *et* Maya JJA concurring):

[1] This is an appeal against an order of the high court granted at the behest of the respondent. In substance the order reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant and directed the first three respondents to reinstate criminal prosecutions and disciplinary proceedings against him. The appeal is with the leave of the court a quo. More precise details of the order appealed against will appear from the exposition of the background that follows. I find it convenient to start that exposition by presentation of the parties.

The Parties

[2] The first appellant is the National Director of Public Prosecutions (NDPP). Advocate Nomgcobo Jiba was appointed on 28 December 2011 as the acting NDPP by the President of the Republic after the suspension from that office of the then incumbent, Mr Menzi Simelane in consequence of a judgment of this court. The second appellant is Advocate Lawrence Mrwebi (Mrwebi) who was appointed on 1 November 2011 as Special Director of Public Prosecutions as the Head of the Specialised Commercial Crimes Unit (SCCU) of the National Prosecuting Authority.

[3] The third appellant is the National Commissioner of the South African Police Service (the Commissioner). During the time period relevant to these proceedings that position was occupied first by General Bheki Cele, thereafter by Lieutenant General Nhlanhla Mkhwanazi, in an acting capacity and finally by General Mangwashi Victoria Phiyega. The fourth appellant, who took centre stage in these proceedings, is Lieutenant General Richard Mdluli (Mdluli) who held the office of National Divisional Commissioner: Crime Intelligence in the South African Police Service (SAPS), a position also described as Head of Crime Intelligence, since 1 July 2009.

[4] The respondent, Freedom Under Law, is a public interest organisation, registered as a non-profit company with offices in South Africa and Switzerland. It is actively involved, inter alia, in the promotion of democracy and the advancement of respect for the rule of law in the Southern African region. Both its board of directors and its advisory board are composed of respected lawyers, judges and other leading figures in society at home and abroad.

Background

[5] It is common cause that on 31 March 2011 Mdluli was arrested and charged with 18 criminal charges, including murder, intimidation, kidnapping, assault with intent to do grievous bodily harm and defeating the ends of justice. The murder

charge stemmed from the killing of Mr Tefo Ramogibe (the deceased) on 17 February 1999. From about 1996 until 1998 the deceased and Mdluli were both involved in a relationship with Ms Tshidi Buthelezi. The deceased and Buthelezi were secretly married during 1998. Mdluli was upset about this and addressed the issue on numerous occasions with Ms Buthelezi and the deceased and members of their respective families. At the time Mdluli held the rank of senior superintendent and the position of commander of the detective branch at the Vosloorus police station. Charges of attempted murder, intimidation, kidnapping, et cetera, rested on allegations by relatives and friends of the deceased and Ms Buthelezi that Mdluli and others associated with him – including policemen under his command – brought pressure to bear upon them through violence, assaults, threats, kidnappings and in one instance rape, with the view to compelling their co-operation in securing the termination of the relationship between the deceased and Ms Buthelezi. According to one of the complainants who is the mother of the deceased, Mdluli had on occasion taken her to the Vosloorus police station where she found the deceased injured and bleeding. In her presence Mdluli then warned the deceased to stay away from Ms Buthelezi. The deceased was killed a few days thereafter.

[6] On 23 December 1998 the deceased was the victim of an attempted murder. He reported the incident to the Vosloorus police station. On 17 February 1999 the deceased and the investigating officer, Warrant Officer Dhlomo, drove to the scene in Mdluli's official vehicle for the stated purposes of the deceased participating in a pre-arranged pointing out. According to Dhlomo they were attacked by two unknown assailants at the scene who shot at them and took away his firearm and the vehicle in which they were travelling. He ran to a nearby tuck-shop to summon the police. Upon his return he found that the deceased had been killed. At the time, the matter never proceeded to trial. Much of the original docket and certain exhibits have since been lost or have disappeared.

[7] Information about the discontinued investigation re-surfaced after Mdluli was appointed the Head of Crime Intelligence in 2009. Two senior officers of the

Directorate of Priority Crime Investigation (the Hawks), Colonel Roelofse and Lieutenant-Colonel Viljoen, were appointed to assist in the renewed investigations and Mdluli came to be arrested on these charges – to which I shall refer as the murder and related charges – on 31 March 2011. In the light of the seriousness of these charges, the then Commissioner of Police, General Bheki Cele, suspended Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him.

[8] After Mdluli's arrest on the murder and related charges, some members of Crime Intelligence came forward with information concerning alleged crimes committed by some of its members, including Mdluli. Lieutenant Colonel Viljoen, who was involved in the investigation of the murder and related charges, was instructed to investigate these allegations in conjunction with Advocate C Smith of the Specialised Commercial Crime Unit (SCCU). Following upon these investigations, Smith successfully applied for a warrant for Mdluli's arrest on charges of fraud and corruption which was executed on 20 September 2011.

[9] What emerges from the papers filed of record is that the charges of fraud and corruption originate from the alleged unlawful utilisation of funds held in the Secret Service account – created in terms of the Secret Services Act 56 1978 – for the private benefit of Mdluli and his wife, Ms Theresa Lyons. Broadly stated it is alleged that one of Mdluli's subordinates, Colonel Barnard, purchased two motor vehicles ostensibly for use by the Secret Service but structured the transaction in such a manner that a discount of R90 000 that should have been credited to the Secret Service account, was utilised for Mdluli's personal benefit. The further allegation was that those two motor vehicles were then registered in the name of Mdluli's wife and appropriated and used by the two of them.

[10] On 3 November 2011 Mdluli wrote a letter to President Zuma, the Minister of Safety and Security and the Commissioner stating that the charges against him were the result of a conspiracy among senior police officers – including the then

Commissioner, General Bheki Cele, and the head of the Hawks, General Anwar Dramat. The letter also stated, rather inappropriately, that '[i]n the event that I come back to work, I will assist the President to succeed next year' which was an obvious reference to the forthcoming presidential elections of the ruling African National Congress in Mangaung towards the end of 2012. The allegations of a conspiracy led to the appointment by the Minister of a task team which later reported that there was no evidence of a conspiracy and that the police officers who had accused Mdluli of criminal conduct had acted in good faith.

[11] On 17 November 2011 Mdluli's legal representatives made representations to Mrwebi in his capacity as Special DPP and head of the SCCU, seeking the withdrawal of the fraud and corruption charges. These representations again contended that the charges against Mdluli resulted from a conspiracy against him involving the most senior members of the South African Police Service. The representations also indicated that a similar approach had been made to Advocate K M A Chauke, the DPP South Gauteng, for withdrawal of the murder and related charges. Mrwebi, in response to the representations made to him, requested a report from Smith and his immediate superior, Advocate Glynnis Breytenbach, who both responded with a motivation that the charges should not be withdrawn. Despite this motivation, Mrwebi decided to withdraw these charges and notified Mdluli's representatives of his decision to do so on or about 5 December 2011. The circumstances under which Mrwebi's decision was arrived at is central to one of the disputes in this case. I shall revert to this in due course.

[12] On 1 February 2012 Chauke decided to withdraw the murder and related charges as well. He explained that after he received the representations by Mdluli's legal representatives, he realised that there was no direct evidence implicating Mdluli in the murder charge. He therefore decided that an inquest should be held before he proceeded with that charge and that the murder charge should therefore be provisionally withdrawn pending the outcome of the inquest. To prevent

fragmented trials, so he said, he decided that the 17 charges related to the murder should also be provisionally withdrawn, pending finalisation of the inquest.

[13] I pause to record that at Chauke's request the inquest was held in terms of the Inquests Act 58 of 1959 by the magistrate of Boksburg who handed down his reasons and findings on 2 November 2012. His ultimate conclusions make somewhat peculiar reading, namely that:

'The theory of Mdluli being the one who had orchestrated the death of [the deceased] is consistent with the facts.'

And that:

'The death [of the deceased] was brought about by an act *prima facie* amounting to an offence on the part of **unknown persons**. There is **no evidence** on a balance of probabilities implicating Richard Mdluli [and his co-accused persons] in the death of the deceased.'

[14] I say peculiar, because s 16(2) of the Inquests Act required the magistrate to determine whether the death of the deceased was brought about by any act or omission amounting to an offence on the part of any person. The evidence before him clearly established a prima facie case against Mdluli. That appears to be borne out by the first conclusion. The second conclusion, which appears to contradict the first seems to be both unhelpful and superfluous. It was not for the magistrate to determine Mdluli's guilt on a murder charge, either beyond reasonable doubt or on a balance of probabilities. But if Chauke had any uncertainty about the import of the magistrate's findings he could have asked for clarification or even requested that the inquest be re-opened in terms of s 17(2) of the Inquests Act. Furthermore, it is clear that the magistrate's findings were wholly irrelevant to the 17 related charges. Nonetheless it is common cause that no further steps have since been taken by the prosecuting authorities to reinstitute any of the 18 charges.

[15] I return to the chronological sequence of events. On 29 February 2012 the Acting National Commissioner of Police at the time, General Mkhwanazi, withdrew

the disciplinary proceedings against Mdluli and on 31 March 2012 he was reinstated and resumed his office as Head of Crime Intelligence. In fact, shortly thereafter, his duties were extended to include responsibility for the unit which provides protection for members of the national executive.

[16] On 15 May 2012 FUL launched the application, the subject of the present appeal. The notice of motion contemplated proceedings in two parts. Part A sought an interim interdict, essentially compelling the Commissioner to suspend Mdluli from office pending the outcome of the review application in part B. In part B FUL sought an order reviewing and setting aside four decisions, namely:

(a) The decision made by Mrwebi on or about 5 December 2011 to withdraw the charges of fraud and corruption.

(b) The decision by Chauke on or about 2 February 2012 to withdraw the murder and related charges.

(c) The decision by the Commissioner of Police on or about 29 February 2012 to terminate the disciplinary proceedings; and

(c) The decision by the Commissioner on or about 31 March 2012 to reinstate Mdluli to his office.

[17] Apart from the orders setting aside the four impugned decisions, FUL also sought mandatory interdicts:

(a) directing the prosecution authorities to reinstate the criminal charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and

(b) directing the Commissioner of Police to take all steps necessary for the prosecution and finalisation of the disciplinary charges.

On 6 June 2012 the interim interdict sought in part A was granted by Makgoba J. The application for leave to appeal against that order was unsuccessful and the interim interdict is thus extant. The review application came before Murphy J who granted an order (a) setting aside the four impugned decisions as well as (b) the mandatory interdict sought together with (c), an order for costs in favour of FUL

against the respondents. His judgment has since been reported sub nom *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP).

FUL's locus standi

[18] I now turn to the appellant's contentions on appeal and I deal first with those arising from challenges by the NDPP and Mrwebi. These relied mainly on formal and procedural objections rather than the merits of the case. Included amongst these formal objections was a challenge to FUL's legal standing. However, this challenge was not pursued in argument. Suffice it therefore to say that in my view the objection to FUL's standing was unsustainable from the start. FUL's mission to promote accountability and democracy and to advance respect for the rule of law and the principle of legality in this country has been recognised by this court (see eg *Freedom Under Law v Acting Chairperson Judicial Service Commission & others* 2011 (3) SA 549 (SCA) paras 19-21). In addition, I agree with the finding by the court a quo that the matter is one of public interest and national importance (para 1 of its judgment). What I do find somewhat perturbing is the court's high praise for Dr Mamphela Ramphele and Justice Johan Kriegler who deposed to FUL's founding and replying affidavits respectively (see para 4). It needs to be emphasised that all litigants, irrespective of their status, should be treated equally by our courts. Judges must therefore be wary of creating the impression – which would undoubtedly be unfounded in this case – that they have more respect for some litigants or their representatives than for others.

Reviewability of decisions to withdraw a prosecution

[19] The next challenge by the NDPP, which was embraced by Mrwebi and Mdluli, related to the reviewability of a prosecutorial decision to discontinue a prosecution. The issue arising from this is a narrow one. This is so because it is not contended by the NDPP that decisions of this kind are not reviewable at all. On the contrary, the NDPP conceded that these decisions are subject to what has become known as a principle of legality or a rule of law review by the court. The allied issue is whether

these decisions are reviewable under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Although the answer to that question is by no means decisive of the matter. I nonetheless believe the time has come for this court to put the issue to rest. This belief is motivated by two considerations. First, because the court a quo had pronounced on the question and held that PAJA is of application (paras 131-132 of the judgment). Secondly, and more fundamentally, by the considerations that appear from the following statement by Ngcobo J in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another* as Amici Curiae) 2006 (2) SA 311 (CC) paras 436-438:

'Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law . . . Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question . . . It follows that the SCA . . . erred in failing to consider whether PAJA was applicable. The question whether PAJA governs these proceedings cannot be avoided in these proceedings.'

[20] The domain of judicial review under PAJA is confined to 'administrative action' as defined in s 1 of the Act. The definition starts out from the premise that 'administrative action' is 'any decision taken, or any failure to take a decision, by . . . a natural or juristic person . . . when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect . . .'. Mrwebi and Chauke derived their power to withdraw the criminal charges against Mdluli from the provisions of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). On the face of it, their decisions sought to be impugned in this case clearly constituted 'administrative action'. But s 1(*ff*) of the definition excludes 'a decision to institute or continue a prosecution'. The question in the present context is thus – does the

exception extend to its converse as well, namely a decision not to prosecute or to discontinue a prosecution?

[21] Cora Hoexter *Administrative Law in South Africa* (2 ed, 2012) at 241-242 is of the firm view that the intention behind the exception 'was to confine review under the PAJA to decisions *not* to prosecute. There is less need to review decisions to prosecute or to continue a prosecution as types of administrative action, since such decisions will ordinarily result in a trial in a court of law'. Thus far our courts have, however, been less decisive. In *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) para 84 Chaskalson CJ acknowledged that:

'In terms of the [PAJA] a decision to institute a prosecution is not subject to review. The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions [as opposed to the decision to institute a prosecution] and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a Court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.'

[22] The implication is therefore that decisions not to prosecute are not necessarily excluded from the application of PAJA. Conversely, in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 27 Navsa JA stated:

'While there appears to be some justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of "administrative action" in terms of s 1(*ff*) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made.'

[23] The court a quo (in paras 131-132 of its judgment) found itself in disagreement with what it described as the *obiter dictum* of Navsa JA that a decision to discontinue prosecution is of the same genus as a decision to prosecute. 'For the reasons stated by Professor Hoexter' so it held, 'a decision of non-prosecution is of a different genus to one to institute a prosecution. It is final in effect in a way that a decision to prosecute is not'.

[24] However, unlike the court a quo I am not persuaded by the reasoning advanced by Professor Hoexter for the view that she proffers. To say that the validity of a decision to prosecute will be tested at the criminal trial which is to follow, is, in my view, fallacious. What is considered at the criminal trial is a determination on all of the evidence presented in the case of the guilt or lack thereof of the accused person, not whether the preceding decision to prosecute was valid or otherwise. The fact that an accused is acquitted self-evidently does not suggest that the decision to prosecute was unjustified. The reason advanced by the court a quo itself, namely, that a decision not to prosecute is final while a decision to prosecute is not, is in my view equally inaccurate. Speaking generally, both these decisions can be revisited through subsequent decisions by the same decision-maker, by in the one case re-instituting the prosecution, and by withdrawing the prosecution in the other.

[25] What is called for, as I see it, is to focus on the policy considerations that underlie the exclusion of a decision to institute or continue to prosecute from the ambit of PAJA and to reflect on whether or not the same considerations of policy will apply to a decision not to prosecute or to discontinue a prosecution. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 35 fn 31 Harms DP cited a line of English cases that emphasised the same policy considerations that underlie the exclusion of decisions to prosecute from the PAJA definition of administrative action. These included *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 (PC) para 14 and *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 para 17. The first principle established by these cases, as I see it, is that in England, decisions to prosecute are not immune from judicial

review but that the courts' power to do so is sparingly exercised. The policy considerations for courts limiting their own power to interfere in this way, appear to be twofold. First, that of safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought. Secondly, the great width of the discretion to be exercised by the prosecuting authority and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy.

[26] As I see it, the underlying considerations of policy can be no different with regard to decisions not to prosecute or to discontinue a prosecution. This view is supported by English authorities dealing with non-prosecution. So, for instance it was said in *R v Director of Public Prosecutions, Ex Parte Manning* [2001] QB 330 para 23:

'[T]he power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the [prosecutor] as head of an independent, professional prosecuting service, answerable to the [National Director of Public Prosecutions] in his role as guardian of the public interest, and to no-one else.'

And by Kennedy LJ in *R v Director of Public Prosecutions, Ex Parte C* [1995] 1 Cr App R 136 at 139G-140A:

'It has been common ground before us in the light of the authorities that this Court does have power to review a decision of the Director of Public Prosecutions not to prosecute, but the authorities also show that the power is one to be sparingly exercised.'

At 141B-C Kennedy LJ then continued to say:

'From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions . . . arrived at the decision not to prosecute . . .'

Whereupon, he proceeded to set out the grounds recognised by the English courts for interference in decisions not to prosecute. Suffice it to say these grounds are substantially similar to the ones recognised by our courts as justification for a rule of law review. The dictum from *Kaunda* does not indicate that a PAJA review might be available, but on the assumption made, the suggestion appears to be that in appropriate circumstances a rule of law review might be apposite.

[27] My conclusion from all this is that:

(a) It has been recognised by this court that the policy considerations underlying our exclusion of a decision to prosecute from a PAJA review is substantially the same as those which influenced the English courts to limit the grounds upon which they would review decisions of this kind.

(b) The English courts were persuaded by the very same policy considerations to impose identical limitations on the review of decisions not to prosecute or not to proceed with prosecution.

(c) In the present context I can find no reason of policy, principle or logic to distinguish between decisions of these two kinds.

(d) Against this background I agree with the *obiter dictum* by Navsa JA in *DA & others v Acting NDPP* that decisions to prosecute and not to prosecute are of the same genus and that, although on a purely textual interpretation the exclusion in s 1(*ff*) of PAJA is limited to the former, it must be understood to incorporate the latter as well.

(e) Although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.

[28] The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in *Affordable Medicines Trust & others v Minister of Health & others 2*006 (3) SA 247 (CC) para 49:

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.’

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of

control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say currently is because it is accepted that '[l]egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner' (see *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614; Cora Hoexter op cit at 124 and the cases there cited). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) paras 28-30).

Impugned decisions to withdraw criminal charges only provisional and not final

[30] This brings me to the further technical challenge by the NDPP, namely that the impugned decisions by Mrwebi and Chauke were not final, but only provisional. The contentions underlying this challenge will be better understood against the statutory substructure of these decisions which is to be found in s 179 of the Constitution, read with the relevant provisions of the NPA Act. Under the rubric 'prosecuting authority' s 179 of the Constitution provides in relevant part:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(*a*) National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(*b*) *Directors* of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) . . .

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions-

(*a*)

(*b*)

(*c*)

(*d*) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the National Director considers to be relevant.'

[31] The national legislation contemplated in s 179 of the Constitution was promulgated in the form of the NPA Act. The power to institute and conduct criminal proceedings is given legislative expression in s 20 which provides:

'(1) The power as contemplated in section 179(2) and all other relevant sections of the *Constitution* to –

(*a*) institute and conduct criminal proceedings on behalf of the State;

(*b*) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(*c*) discontinue criminal proceedings,

vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.

(2) . . .

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* [defined in s 1 as a DPP] shall, subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of –

(*a*) the area of jurisdiction for which he or she has been appointed; and

(*b*) . . ..'

[32] Mrwebi and Chauke, who were both DPPs, were therefore authorised by s 20(3), read with s 20(1)(*c*), to withdraw the criminal charges against Mdluli. But because Mrwebi was appointed as a special DPP his powers were limited by the provisions of s 24(3) which provides:

'A Special Director shall exercise the powers . . . assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers . . . include any of the powers . . . referred to in section 20(1), they shall be exercised . . . in consultation with the Director of the area of jurisdiction concerned.'

[33] According to the NDPP's argument, the withdrawal of the criminal charges in this case must also be understood against the background of s 6 of the Criminal Procedure Act 51 of 1977 (the CP Act). This section draws a distinction between the withdrawal of criminal charges, before an accused person has pleaded – in s 6(*a*) – and the stopping of a prosecution after the accused person has pleaded, as contemplated in s 6(*b*). The latter section provides that where the prosecution is stopped the court is obliged to acquit the accused person, while a withdrawal in terms of s 6(*a*) does not have that consequence. A charge withdrawn under s 6(*a*) can therefore be reinstituted at any time.

[34] The withdrawal of charges by Mrwebi and Chauke, so the NDPP's argument went, was covered by s 6(*a*) and not by s 6(*b*). In consequence, so the argument proceeded, these decisions were only provisional and therefore not

subject to review. Although I am in agreement with the premise of the argument, that both decisions to withdraw were taken in terms of s 6(*a*), my difficulty with its further progression is twofold. First, I can see no reason why, at common law, a decision would in principle be immune from judicial review just because it can be labelled 'provisional' however illegal, irrational and prejudicial it may be. My second difficulty is more fundamental. I do not believe a decision to withdraw a criminal charge in terms of s 6(*a*) can be described as 'provisional' just because it can be reinstituted. It would be the same as saying that because a charge can be withdrawn, the institution of criminal proceedings is only provisional. As I see it, the withdrawal of a charge in terms of s 6(*a*) is final. The prosecution can only be recommenced by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.

[35] The NDPP's second argument as to why the impugned decisions were not final rests on the provisions of s 179(5)(*d*) of the Constitution. Since in terms of this section the decisions were still subject to review by the NDPP, so the argument went, they were only provisional. I have already expressed my reservations about the proposition that because a decision is provisional it is not subject to challenge, based on legality or rationality. What the NDPP's argument based on s 175(5)(*d*) mutated to was the contention that, because the impugned decisions were subject to an internal review, FUL should have been non-suited for failure to exhaust the internal remedies available to it. That, of course, is a completely different case.

Exhaustion of internal remedy

[36] The NDPP's final argument as to why review proceedings were not competent, was that FUL had failed to exhaust an internal remedy available to it. What this contention relied upon was the provision in s 179(5)*(d),* which enables the NDPP to review a decision not to prosecute at the behest of any person or party who the NDPP considers to be relevant. Since I have found a review under PAJA unavailable, s 7(2) of the Act, which compels exhaustion of internal remedy

as a pre-condition to review, save in exceptional circumstances, does not apply. At common law the duty to exhaust internal remedies is far less stringent. As Hoexter (op cit 539) explains, the common law position is that a court will condone a failure to pursue an available internal remedy, for instance where that remedy is regarded as illusory or inadequate.

[37] In this case we know that Advocate Breytenbach made a request early on to the NDPP, which was supported by a 200-page memorandum, that the latter should intervene in Mrwebi's decision to withdraw the fraud and corruption charges. In addition, the dispute had been ongoing for many months before it eventually came to court and, during that period, it was widely covered by the media. But despite this wide publicity, the high profile nature of the case and the public outcry that followed, the NDPP never availed herself of the opportunity to intervene. Against this background FUL could hardly be blamed for regarding an approach to the NDPP as meaningless and illusory in a matter of some urgency.

Challenge to decision to withdraw the fraud and corruption charges

[38] FUL's first challenge of this decision rests on the contention that Mrwebi had failed to comply with the provisions of s 24(3) of the NPA Act in that he did not take the decision to withdraw the charges 'in consultation' with the DPP 'of the area of jurisdiction concerned' as required by the section. As to the legal principles involved, it has by now become well established that when a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after consultation with' which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.

[39] An understanding of the factual basis for the challenge calls for elaboration of the facts given thus far. The DPP of the area of jurisdiction concerned, as envisaged by s 24(3), was Advocate Mzinyathi, the DPP of North Gauteng. Mrwebi's version in his answering affidavit is that he briefly discussed the matter with Mzinyathi on 5 December 2011, after which he prepared an internal memorandum addressed to Mzinyathi, setting out the reasons why, in his view, the fraud and corruption charges should be withdrawn. Although Mzinyathi did not agree with him at that stage, there was a subsequent meeting between the two of them, together with Advocate Breytenbach, on 9 December 2011. At that meeting, so Mrwebi said, the other two were initially opposed to the withdrawal of the charges, but that all three of them eventually agreed that there were serious defects in the State's case and that the charges should be provisionally withdrawn. However, the problems with this version are manifold. Amongst others, it is in direct conflict with the contents of Mrwebi's internal memorandum of 5 December 2011 from which it is patently clear that by that stage he had already taken the final decision to withdraw the charges. The last two sentences of the memorandum bear that out. They read:

'The prosecutor is accordingly instructed to withdraw the charges against both Lt-General Mdluli and Colonel Barnard immediately.'

And:

'The lawyers of Lt-General Mdluli will be advised accordingly.'

[40] An even more serious problem with the version presented in Mrwebi's answering affidavit, is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the court a quo (paras 47-48). I find a repetition of that recordal unnecessary. What appears in sum is that Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5

December 2011; that at that stage he did not know what Mzinyathi's views were; and that he only realised on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was *functus officio,* because he had already informed Mdluli's attorneys of his decision.

[41] In these circumstances I agree with the court a quo's conclusion (para 55) that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone the decision cannot stand.

[42] The court a quo gave various other reasons why Mrwebi's impugned decision cannot stand. These are comprehensively set out in the judgment of the court a quo under the heading 'the withdrawal of the fraud and corruption charges' (para 141 et seq). However, in the light of my finding that the decision falls to be set aside on the basis that it was in conflict with the empowering statute, I find it unnecessary to revisit these reasons. Suffice it to say that, in the main, I find the court's reasoning convincing and nothing that has been said in arguments before us casts doubt on their correctness.

The decision to withdraw the murder and related charges

[43] This brings me to the decision by Chauke to withdraw the murder and related charges. It will be remembered that on Chauke's version, he withdrew the murder charge pending the outcome of the inquest that he had requested and that

he withdrew the 17 other related charges to avoid a fragmented trial. The contention by FUL was in essence that this decision was irrational. However, as I see it, the contention has not been substantiated in argument. On the face of it the decision that the findings at an inquest could perhaps enable him to take a more informed view of the prospects of the State's case with regard to the murder charge, was not irrational. It is true that the outcome of the inquest could have no impact on the 17 related charges. But Chauke never thought that it would. As I understand his reasoning, he always intended to reinstate at least some of the charges after the inquest, with or without the murder charge. What he tried to avoid, so he said, was a fragmentation of trials. That line of reasoning I do not find irrational either, particularly since the evidence supporting the related charges would also impact on the murder charge. It is true that he could have asked for a postponement of the 17 related charges pending the inquest, but we know that a postponement is not for the asking. It could be successfully opposed by Mdluli, in which event the fragmentation, which Chauke sought to avoid for understandable reasons, may have become a reality.

[44] FUL's real argument, which found favour with the court a quo (para 183) is that Chauke's failure to proceed with the murder and related charges after the findings of the inquest became available, was irrational. But that decision – or really his failure to apply his mind afresh to the matter after the conclusion of the inquest – was not the subject of the review application. It will be remembered that the review application started in May 2012 while the results of the inquest only became available in November of that year. Stated somewhat more concisely: I do not believe the earlier decision to withdraw the charges – which is the impugned decision – can be set aside on the basis that a subsequent decision, taken in different circumstances, not to reinstate all or some of those charges, was not justified. To that extent the appeal must therefore succeed.

[45] However, having said that, senior counsel for the NDPP conceded, rightly and fairly in my view, that there is no answer to the proposition that at least some

of the murder and related charges are bound to be reinstated. In the light of this concession he undertook on behalf of his client – which undertaking was subsequently elaborated upon in writing:

(a) That the NDPP will take a decision as to which of the 18 charges are to be reinstated and will inform FUL of that decision within a period of 2 months from this order.

(b) If the NDPP decides not to institute all 18 charges, he will provide FUL with his reasons for that decision during the same period.

I can see no reason why this undertaking should not be incorporated in this court's order and I propose to do so.

Jurisdiction of the high court to review the decision to terminate disciplinary proceedings

[46] This brings me to the decisions by the Commissioner of Police, to terminate the disciplinary proceedings against Mdluli and then to reinstate him to his position on 27 March 2012. Not unlike the NDPP, the Commissioner's response to FUL's challenge to these decisions focused mainly on technical objections, rather than to defend the decisions on their merits. The first technical objection was that the high court lacked jurisdiction to review the impugned decisions by virtue of s 157 of the Labour Relations Act 66 of 1995. The court a quo found this argument fundamentally misconceived (para 227) and I agree with this finding. The argument rests on the premise that this is a labour dispute, which it is not. It is not a dispute solely between employer and employee. The mere fact that the remedy sought may impact on the relationship between Mdluli and his employer does not make it a labour dispute. It remains an application for administrative law review in the public interest, which is patently subject to the jurisdiction of the high court.

Mootness

[47] The Commissioner's next technical objection was that the impugned decision had become moot. The factual basis advanced for the contention was that, shortly after the application had been launched, disciplinary charges were again initiated against Mdluli – which charges are currently pending – and that he was again suspended from office, which suspension is still in force. It is common cause, however, that the new disciplinary charges do not pertain to the murder and 17 related charges. Nor do they correspond with the fraud and corruption charges that were withdrawn by Mrwebi. In this light I can find no merit in the mootness argument. The fact that disciplinary proceedings had been instituted on charges A and B obviously does not render moot the challenge of a decision to terminate disciplinary proceedings on charges Y and Z.

Review of a decision to terminate disciplinary proceeding

[48] The Commissioner's powers to institute disciplinary charges and to suspend members of the police derive from regulations published under the South African Police Services Act 68 of 1995. These powers can be traced back to s 207(2) of the Constitution which requires the Commissioner to manage and exercise control over the SAPS. These powers are clearly public powers. That is why they were promulgated by law and not merely encapsulated in a contract between the parties. The Commissioner took the decision to institute disciplinary proceedings against Mdluli and to suspend him pursuant to these powers. When he decided to reverse those decisions, he did so in the exercise of the same public powers. It follows that the latter decisions constituted administrative action, reviewable under the provisions of PAJA.

[49] As the factual basis for the challenge of these decisions, FUL relied in its founding affidavit on a statement by the then Acting Commissioner, Lieutenant-General Mkhwanazi, in Parliament that he was instructed by authorities 'beyond' him to withdraw disciplinary charges and reinstate Mdluli in his office. FUL added that in doing so Mkhwanazi had failed to make an independent decision which

rendered his actions reviewable. Though Mkhwanazi filed an answering affidavit in the interim interdict proceedings in part A of the notice of motion, he did not deal with these allegations. In the answering affidavit filed in part B, the present Commissioner, General Phiyega, said the following in response to these allegations by FUL.

'General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never received any instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of the Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue.'

[50] But despite these undertakings, no confirmatory affidavit was filed by Mkhwanazi nor was a copy of Hansard provided. In argument before the court a quo, the Commissioner's representatives again undertook to file an affidavit by Mkhwanazi, but this undertaking was later withdrawn (para 213 of the judgment a quo). In the premises the court a quo held (para 214) that the Commissioner's explanation was untenable and stood to be rejected. I do not believe this finding can be faulted. Moreover, after all is said and done, neither Mkhwanazi nor Phiyega gave any reasons for the impugned decision. The inevitable conclusion is thus that the decisions were either dictated to Mkhwanazi or were taken for no reason at all. In either event they fall to be set aside under s 6 of PAJA. This means that the appeal against the court a quo's order to that effect cannot be sustained.

Appropriate remedy

[51] What remains are issues concerning the appropriate remedy. As we know, the court a quo did not limit itself to the setting aside of the impugned decisions. In

addition, it (a) ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and (b) directed the Commissioner of Police to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings (para 241(*e*) and (*f*)). Both the NDPP and the Commissioner contended that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far.

Costs

[52] As to the court a quo's costs order against the appellants in favour of FUL, I can see no reason to interfere. Although I propose to set aside some of the orders granted by the court a quo, it does not detract from FUL's substantial success in that court. On appeal the position is different. Here it is the appellants who achieved substantial success. Ordinarily this would render FUL liable for the appellants' costs on appeal. But it has by now become an established principle that in constitutional litigation unsuccessful litigants against the Government are generally not mulcted in costs, lest they are dissuaded from enforcing their constitutional rights. (See eg *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).) Although the rule is not immutable, I find no reason

to deviate from the general approach in this case. Hence I shall make no order as to the costs of appeal.

[53] The order I propose should therefore reflect the intent:

(a) To confirm the setting aside of Mrwebi's decision to withdraw the fraud and corruption charges in para (*a*) as well as the setting aside of the Commissioner's decision to terminate the disciplinary proceedings against Mdluli in para (*c*) as well as the setting aside of Mdluli's reinstatement by the Commissioner on 28 March 2012 in para (*d*) of the order of the court a quo.

(b) To reverse the setting aside of Chauke's decision to withdraw the murder and related charges in para (*b*) of that order.

(c) To set aside the mandatory interdicts in paras (*e*) and (*f*) of the order;

(d) To confirm the costs order in paras (*g*) and (*h*) of the order; and

(e) To give effect to the undertaking on behalf of the NDPP with regard to the reinstitution of the murder and related charges.

[54] In the premises it is ordered that:

1 The appeal succeeds only to the extent that paragraphs (b), (e) and (f) of the order of the court a quo are set aside

2 The orders in paragraphs (*a*), (*c*), (*d*), (*g*) and (*h*) of the order by the court a quo are confirmed but re-numbered in accordance with the changes necessitated by the setting aside of the orders in paragraph 1.

3 It is recorded that the following undertaking has been furnished on behalf of the first respondent:

(a) To decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February 2012, are to be reinstituted and to make his decision known to the respondent within 2 months of this order.

(b) To provide reasons to the respondent within the same period as to why he decided not to reinstitute some – if any – of those charges.

4. There shall be no order as to costs in respect of the appeal.

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F D J BRAND
JUDGE OF APPEAL

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APPEARANCES:

For the 1st and 2nd Appellants:	L Hodes SC (with him N Manaka, E Fasser) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 3rd Appellants:	W R Mokhali SC (with him M Zulu) Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the 4th Appellant:	I Motloung Instructed by: Maluleke Seriti Makume Matlala Inc, Germiston c/o Peyper Attorneys, Bloemfontein
For the Respondent:	S Yacoob (with him I Goodman, N van der Walt) Instructed by: Cliffe Dekker Hofmeyr, Johannesburg Matsepes, Bloemfontein